

March 21, 1978

MEMORANDUM FOR HEADS OF AGENCIES

SUBJECT: Implementation of Executive Order 11988 on Floodplain Management and Executive Order 11990 on Protection of Wetlands

President Carter issued two Executive orders last May requiring all executive agencies to take special care when undertaking actions that may affect wetlands or floodplains, directly or indirectly. The orders require agencies to avoid disrupting these areas wherever there is a practicable alternative, and to minimize any environmental harm that might be caused by federal actions. The President directed all agencies to provide national leadership by taking actions to encourage sound land use practices.

These orders were important components of the President's Message on the Environment last year. The President and the public are looking to each agency for timely and effective implementation. This memorandum addresses four matters relating to the implementation of the orders that have been brought to our attention by agency officials.

Relationship Between the Two Orders

Several agencies have inquired how to handle situations when both orders would apply, as, for example, in coastal areas, where most wetlands are located in floodplains. Although we do not believe this will be a practical problem, the basic rule is: both orders should be followed if an action overlaps floodplains and wetlands areas, but the floodplains order (which is more detailed) should control if there appears to be any conflict or question about how to carry out the orders. This policy will avoid potential confusion and duplication between the two Executive orders.

2C

DC

EXC

SA

C/REB

RO

3 C/FE

PE

C/HEB

PE

FILE

SUSPENSE DATE

20 JUL 78

Agency Procedures

Both orders require agencies to have procedures for complying with their requirements. The floodplains order sets a deadline for agencies to "issue or amend existing regulations and procedures within one year," which will be May 24, 1978. The orders also encourage agencies to use existing decision-making processes where appropriate. Incorporating the orders' requirements into agency planning and decisionmaking procedures can ensure that wetland and floodplain values will be part of existing programs and will not cause unnecessary duplication or delay in government operations. Additional guidance concerning agency procedures is attached.

June Progress Report

Floodplains. Section 5 of the floodplains Executive order requires the head of each agency to submit a report to CEQ and WRC on June 30, 1978 on the status of agency procedures and the impact of the order on the agency's operations. The reports will be helpful in preparing our progress reports to President Carter on the implementation of his orders. They will also assist the WRC in its continuing review of agency practices and procedures, as directed by Section 5 of the order.

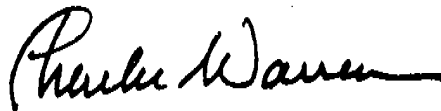
Wetlands. The Council requests at this time that you transmit a similar report on June 30 to us on your agency's experience with the wetlands order (we indicated last November that we would be requesting a first-year report on E.O. 11990).

The attachment to this memo provides further guidance on the content of the reports.

Application of the Orders

Several agencies have questioned whether the Executive orders apply to their activities. The orders explicitly state that they apply to specified actions of all executive agencies, including the military departments, as the term "executive agency" is used in Section 105 of Title 5 of the United States Code. The orders apply to those agency activities which directly or indirectly affect floodplains or wetlands.

If you have some impediment to complying with a particular requirement of the orders, please identify the problems in your June 30 report. You should indicate how your agency will meet the President's overall policy direction if particular procedural requirements cannot be followed in every case. Each agency will be expected to have a set of procedures which explains how the agency will comply with the orders. Other quasi-governmental organizations, such as certain joint commissions, are urged to adopt the orders' policies and procedures for their own operations as well.



CHARLES WARREN
Chairman

Attachment

This attachment provides further guidance on agency procedures and the June 30 progress report. We have tried to answer several inquiries the Council has received on the implementation of the orders.

1. Single set of procedures. Each department should have a single set of procedures which apply to all units. Major sub-departmental components (such as agencies, bureaus, and administrations) that have programs and activities which substantially affect wetlands or floodplains should also have their own procedures, which may be included or incorporated by reference in the departmental procedures.

2. Content. Agency procedures for implementing the orders should contain relevant materials explaining:

(a) policy directives, such as commitments to sound management, ranging from the design of agency programs and proposals through the monitoring and evaluation of agency activities;

(b) substantive requirements, such as standards for selecting alternatives and minimizing harm;

(c) mechanical requirements, such as timing, preparation, and circulation of documents and public notices; and

(d) other useful information, such as identifying officials in Washington and in the field who are responsible for the agency's compliance with the orders.

3. Form. Agency procedures are required to be issued in a form that an agency customarily uses to establish binding procedures which govern the conduct of agency staff, whether these are called rules, regulations, procedures, orders, or something else. Staff manuals and more specialized supplementary guidance may also be helpful. The Council places great importance on having these procedures written in plain, direct language. We would urge you to request your staff to edit the regulations again if you find them hard to read. Federal, state, and local officials, applicants for federal permits or aid, and members of the public should be able to understand and use these procedures without difficulty.

4. Deadline. Some agencies have expressed concern about meeting the May 24 deadline for floodplain procedures. To provide agencies with as much time as possible to prepare a specific and practical set of procedures, this requirement may be read to require final procedures to be published, rather than to be effective, by May 24. It would also be permissible for individual units which should have their own procedures to be covered by an adequate set of departmental regulations on a temporary basis, if the unit issues basic policy guidance to staff and publicly announces a schedule for producing its own procedures. These should be published in final form no later than November 1978.

5. Relationship to NEPA Regulations. Several agencies have inquired about delaying their procedures pending the issuance of our NEPA regulations. There is no basis for postponing action to comply with the floodplains and wetlands orders because we expect the basic environmental impact statement process to be retained in the regulations (assessment/early notices, draft, final, referral/decision). Agency procedures can be modified if necessary to accommodate any changes in the impact statement process.

6. WRC Guidelines. The U.S. Water Resources Council has recently issued guidance to assist agencies in preparing their regulations. The WRC's "Floodplain Management Guidelines for Implementing E.O. 11988" (Feb. 10, 1978) are an excellent basis for a general understanding of the order and for guidance on its implementation.

7. Consultation. As the WRC Guidelines note, agencies are required to consult with the WRC, Federal Insurance Administration (FIA) and CEQ before publishing their procedures or making them available for public review. WRC and FIA will be reviewing these procedures in detail. In accord with our oversight and coordination responsibilities, the Council will focus on mediating any major disagreements among agencies in an effort to implement the order promptly. Agencies should follow a similar approach in issuing or amending procedures under the wetlands order, and should consult with EPA, the Army Corps of Engineers, and CEQ.

8. Recommended Schedule. For those agencies which have not yet written their procedures for the floodplains order, we recommend that draft procedures be prepared and consultation begun before the end of this month. Federal Register publication initiating a 30-day public review period in April could be followed by a few weeks in May for staff revision and agency approval.

June 30 Progress Report

We will be looking for several items in your report. In addition to providing a list and a copy of all your agency's procedures and guidance for implementing the order, please indicate the schedule for preparing any further procedures or guidance, whether formal or informal.

The Council is especially concerned with the substantive influence of the order on agency decisions which affect floodplains and wetlands. Your reports should indicate, at a minimum:

- 1) the number of times you have made a finding that there was no practicable alternative to siting an action in a floodplain and/or in a wetland (broken down by major agency programs); and
- 2) an estimate of the number of acres directly affected by these decisions and, where known, the number of acres indirectly affected.

These figures should be readily obtainable from the public notices prepared by your staff under Section 2(a) of the order and from environmental impact statements and assessments. We would also be pleased to receive information on actions which have enhanced floodplains and wetlands.

EXECUTIVE SECRETARIAT

Routing Slip

DDA

TO:

| | | ACTION | INFO | DATE | INITIAL |
|----|----------|--------|------|------|---------|
| 1 | DCI | | | | |
| 2 | DDCI | | | | |
| 3 | D/DCI/IC | | | | |
| 4 | DDS&T | | | | |
| 5 | DDI | | | | |
| 6 | DDA | ✓ | | | |
| 7 | DDO | | | | |
| 8 | D/DCI/NI | | | | |
| 9 | GC | | | | |
| 10 | LC | | | | |
| 11 | IG | | | | |
| 12 | Compt | | | | |
| 13 | D/Pers | | | | |
| 14 | D/S | | | | |
| 15 | DTR | | | | |
| 16 | A/DCI/PA | | | | |
| 17 | AO/DCI | | | | |
| 18 | C/IPS | | | | |
| 19 | DCI/SS | | | | |
| 20 | | | | | |
| 21 | | | | | |
| 22 | | | | | |

SUSPENSE

Date

Remarks:

D/Log

FYI